

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1441

To be argued by
JANE W. PARVER

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1441

UNITED STATES OF AMERICA,

Appellee

v.

JOHN MICHAEL TAKACH

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

JANE W. PARVER,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*

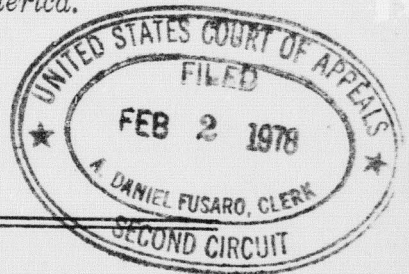




TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
A. Summary	2
B. The Government's Case	3
1. The 1977 Fraud	3
2. The Similar Act Proof	6
C. The Defense Case	8
ARGUMENT:	
The District Court Properly Admitted The Similar Act Evidence On The Question Of Defendant's Intent	9
CONCLUSION	15

TABLE OF CASES

<i>United States v. Albergo</i> , 539 F.2d 860 (2d Cir. 1976), <i>cert. denied</i> , 436 U.S. 1000 (1977)	10
<i>United States v. Braunig</i> , 553 F.2d 777 (2d Cir.), <i>cert. denied</i> , 431 U.S. 959 (1977)	10
<i>United States v. Braverman</i> , 376 F.2d 249 (2d Cir.), <i>cert. denied</i> , 389 F.2d 280 (2d Cir. 1967)	11
<i>United States v. Cavallaro</i> , 553 F.2d 300 (2d Cir. 1977)	10
<i>United States v. Chestnut</i> , 533 F.2d 40 (2d Cir.), <i>cert. denied</i> , 429 U.S. 829 (1976)	10

	PAGE
<i>United States v. Cyphers</i> , 556 F.2d 630 (2d Cir.), cert. denied, 431 U.S. 972 (1977)	10
<i>United States v. Grady</i> , 544 F.2d 598 (2d Cir. 1976)	10
<i>United States v. Johnson</i> , 382 F.2d 280 (2d Cir. 1967)	11
<i>United States v. Kaufman</i> , 453 F.2d 306 (2d Cir. 1971)	11
<i>United States v. Klein</i> , 340 F.2d 547 (2d Cir.), cert. denied, 382 U.S. 850 (1965)	11
<i>United States v. Leonard</i> , 524 F.2d 1076 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976)	13, 14
<i>United States v. Magnano</i> , 543 F.2d 431 (2d Cir. 1976), cert. denied, 429 U.S. 1091 (1977)	9
<i>United States v. Natale</i> , 526 F.2d 1160 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976)	13
<i>United States v. Robbins</i> , 340 F.2d 684 (2d Cir. 1965)	11
<i>United States v. Robinson</i> , 560 F.2d 507 (2d Cir. 1977) (<i>en banc</i>)	10, 13, 14
<i>United States v. Santiago</i> , 528 F.2d 1130 (2d Cir.), cert. denied, 425 U.S. 972 (1972)	10, 13
<i>United States v. Viruet</i> , 539 F.2d 295 (2d Cir. 1976)	10

TABLE OF STATUTES

Rule 404(b) Federal Rules of Evidence	10, 12, 13
---	------------

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1411

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN MICHAEL TAKACH

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

John Michael Takach appeals from a judgment of conviction entered on October 13, 1977, in the United States District Court for the Southern District of New York, after a two day trial before the Honorable William C. Conner, United States District Judge, and a jury.

Indictment 77 Cr. 503, filed on July 1, 1977, charged Takach in four counts with mail fraud, in violation of Title 18, United States Code, Section 1341.

Trial commenced on August 22, 1977, and concluded on August 23, 1977, when the jury convicted Takach on all counts in the indictment. On October 13, 1977, Judge Conner sentenced the defendant to a three year term of imprisonment on each of the four counts, the sentences to run concurrently.

Takach is free on bail pending this appeal.

Statement of Facts

A. Summary

In March 1977, John Michael Takach instituted a scheme to defraud by mail model railroad enthusiasts and others who had advertised in railroad-related magazines for equipment. Takach responded by mail to four persons, in three instances on stationery bearing the letterhead of the New York Police Department Internal Affairs Division, indicating he had available the desired railroad equipment or articles. In each response Takach represented that the desired item was in very good to excellent condition, quoted a reasonable price and requested payment, in advance of shipment, to be made to a private mailing address, 166 West 21st Street, New York, New York. The buyers, who lived in Arkansas, Texas and Colorado, then mailed the defendant checks and money orders but never received either merchandise or a refund of their money.

At trial Takach admitted that he had responded to the advertisements and had received the checks and money orders, but, in defense, denied any intent to defraud the purchasers. Instead, he claimed that his arrest by postal authorities and incarceration for 34 days prevented him from sending out the merchandise and/or refunding the money. To meet and rebut this defense which had been announced in Takach's opening, the Government proved, as part of its direct case, certain prior similar acts which the District Court admitted solely on the issue of defendant's intent.

B. The Government's Case

1. The 1977 Fraud

In February, 1977, John Michael Takach opened an account with the Downstairs Mail Service,* a mail receiving service located at 166 West 21st Street, New York, New York. (GX 1A, 1B; Tr. 32, 35).** Using this account as his mailing address, Takach then responded to various advertisements for equipment which appeared in the April 1977 issue of Trains Magazine (GX 5), and the February, March, April and May issues of Model Railroader Magazine. (GX 61, 62, 63, 64).

Takach wrote to Austin F. Barr, of Harrisburg, Arkansas, and advised him that he had the 1909 locomotive dictionary sought by Barr. (GX 10; Tr. 46-47). Takach corresponded with Paul Duane White, of Fort Worth, Texas, and offered him empty Lionel train boxes for which White had advertised. (GX 7; Tr. 90-91). Takach mailed to Caboose Antiques, of Nederland, Colorado, a list of railroad kerosene lanterns which defendant represented were available and in very good-to-excellent condition. (GX 8; Tr. 96). Finally, Takach wrote to Robert Wandel, Jr., of Denver, Colorado, and offered him the model brass diesel for which Wandel had advertised. (GX 14; Tr. 58-60).

In each of these letters, Takach requested prepayment, by personal check or money order to his mailing address,

* The account was in both the defendant's full name and "J.M.T."; subsequently a third name, John Yuengling Associates, was added.

** "Tr." refers to the trial transcript; "GX" to Government exhibits; "Br." to the defendant's brief on appeal.

166 West 21st Street.* The prices quoted by Takach were reasonable or very good. (Tr. 49, 60, 98). Three of the four letters (GX 7, 10, 14) displayed a letterhead of the Police Department, Internal Affairs Division, New York, N.Y. 10013. Takach was not and never had been employed by the New York City Police Department. (Tr. 65).**

Upon receipt of Takach's letters, Paul White and James Stewart Keith (of Caboose Antiques) mailed a personal check and bank cashier's check, respectively, to Takach at the 166 West 21st Street address. (GX 6, 9; Tr. 92, 98). Both checks then were endorsed "John Michael Takach" and deposited into defendant's savings account at the Empire Savings Bank. (GX 6, 9, 40, 42-45; Tr. 106-110). Although they had quickly responded to the purchase invitations with payment of the appropriate price, neither White nor Keith ever received the merchandise or a refund of money. (Tr. 94, 99).*** White and Keith each wrote to Takach with follow-up inquiries but never received a response from him. (Tr. 93-94, 99). White also attempted to telephone the de-

* In three instances, (GX 8, 10 and 14), Takach also added that he would refund the money on demand if the buyer was not satisfied.

** Robert Berger, former production man for Atlee Printing Corp., 545 West 45th Street, New York, New York, testified that paper bearing this police department letterhead had been stored at Atlee Printing and that Takach had been employed at Atlee Printing during February through May 1977. (GX 4; Tr. 66-68). At the time of Takach's arrest on May 11, 1977, blank paper with the same police department letterhead was found in his room. (GX 4; Tr. 72-73). Also found at that time was the April 1977 issue of Trains Magazine in which copy the Caboose Antique's advertisement had an ink line drawn next to it. (GX 5; Tr. 72-74).

*** Both White and Keith had successfully purchased items through the mail before and estimated that it should take 3-5 days to ship from New York. (Tr. 93, 104-05).

fendant but learned that there was no New York City listing for him. (Tr. 94). Thus, as of August 22, 1977, Messrs. White and Keith never had heard again from Takach who had the money each had earlier mailed to him. (Tr. 94, 99).

Robert Wandel, Jr. and Austin F. Barr both mailed money orders to Takach. (GX 16A; Tr. 49, 60-61). On these occasions, Takach subsequently returned the money orders by mail, explaining that various mix-ups with the Postal Service prevented him from cashing them and he requested prepayment by personal check. (GX 12, 15; Tr. 50, 61).

Wandel, in response to Takach's communication, secured a letter from his local postmaster concerning the money order and mailed back the money order and letter, this time addressing it to the defendant at the New York City Police Department. (Tr. 61-63).^{*} Wandel never heard from Takach again and never received the diesel. (Tr. 63-64). Of course, since Takach did not work for the police department, he never received this money order.

Barr, after receiving back his money order, mailed Takach a personal check, dated April 9, 1977, for the locomotive dictionary. Barr's check was subsequently endorsed and deposited in defendant's savings account on April 15, 1977. (GX 11, 40, 41, 43; Tr. 50). When Barr did not receive his purchase he wrote Takach and also placed a person-to-person telephone call to him at the West 21st Street address, only to learn Takach was not listed at that address. (Tr. 51-52). Barr then attempted to call Takach at the Police Department address and, of

^{*} Wandel assumed from defendant's stationery that Takach was a police officer or employee of the New York Police Department. (Tr. 61-62).

course, could not locate him there. (Tr. 52). Barr finally received a letter, dated May 10, 1977, (GX 13), from Takach informing him that the dictionary had been shipped parcel post insured book rate on April 25th. Takach wrote that he would initiate an insurance claim and that Barr would have the book or money by the first week in June.* Barr did not hear from Takach again, and never received either his book or a refund of money. (Tr. 53).**

2. The Similar Act Proof

The Government introduced evidence that Takach previously had defrauded three other victims in precisely the same manner as charged in the indictment.*** John Benson, John Buursema, and Albert Wesling testified that in the spring of 1974 each had advertised in a railroading magazine for model railroad equipment and had received a letter from Takach representing that he had the desired merchandise and requesting pre-payment. (GX 20, 22, 65, 66; Tr. 117-118, 123-125, 131-132).

* Leo Buongiorno, a United States Postal Service supervisor, testified that when a package is shipped insured parcel post, only the sender can submit a claim to the Postal Service for the insured parcel. (Tr. 44-45.)

** When the Government announced its intention to call a handwriting expert, the defense stipulated that Takach had written and signed the correspondence received by Messrs. White, Barr and Wandel, and Caboose Antiques (GX 6, 8, 10, 12, 13, 14, 15); that Takach had endorsed the checks of White, Barr and Caboose Antiques (GX 7, 9, 11); and that Takach had prepared and signed mail receiving service forms and the Empire Savings Bank signature card. (GX 1A, 1B, 40); (GX 70; Tr. 75, 77, 142-143).

*** Before these witnesses testified, Judge Conner instructed the jury that their testimony was being admitted not to prove anything with respect to the defendant's character or personality, but solely on the issue of Takach's intent to defraud with respect to the mail fraud acts alleged in the indictment. (Tr. 115-116).

Buursema and Wesling mailed payments to Takach but never received their train models. (Tr. 126-128, 135-137, 142). In response to subsequent written inquiries each received a letter from Takach stating that he had previously shipped the merchandise and promising that he would institute a tracer for it and/or file an insurance claim. (GX 21, 26, 27; Tr. 126, 137-138). When neither collector subsequently received his merchandise, each wrote to Takach again, but received neither response, merchandise nor money.* Benson too mailed a money order to Takach and never received his merchandise. (Tr. 119, 122). Upon his inquiry, Takach informed Benson that he never had received the money order. (GX 31). When Benson obtained a copy of the money order from his bank and discovered it was endorsed "John Michael Takach," (GX 33) he wrote Takach demanding his merchandise. Benson never received either his locomotive plates or his money. (Tr. 122).**

Finally the Government proved that in 1975, upon his plea of guilty to Count One of Indictment 74 Cr. 634 (GX 71), Takach was convicted in the Eastern District of New York of devising a scheme to defraud Joseph Toff, Jr., of Ennis, Texas.*** Again, in the same familiar pattern, Takach had responded to an advertisement placed by Toff in a model railroad magazine, and represented that he had the article sought, even though Takach had no intention of providing this article. Takach successfully

* Wesling testified that none of his unanswered letters to Takach ever had been returned. (Tr. 141).

** The defense stipulated that Takach had written the letters to Benson, Buursema and Wesling (GX 20-24, 26, 27, 31, 32) and that Takach had endorsed the money order sent by Benson. (GX 33, GX 70; Tr. 142-143).

*** Judge Conner instructed the jury that the 1975 plea of guilty to a charge of using the mails to defraud was being admitted solely as evidence of Takach's intent in connection with the offenses presently charged. (Tr. 151-152).

induced Toff to make the advance payment, cashed the check and money order, but never delivered to Toff the article ordered. Again, Takach sent lulling letters to Toff, causing him to expect receipt at a future date of the article ordered, although it never was forthcoming. (Tr. 152-154).

C. The Defense Case

John Michael Takach was the only defense witness.

Takach testified that he opened the account with the Downstairs Mail Service in February 1977 in order to have a permanent address where friends could find him until he secured an apartment. (Tr. 160-161). Takach, who said he was very knowledgeable about railroad memorabilia, admitted that he then responded to the magazine advertisements of Messrs. Barr, Wandel, White and Caboose Antiques, and ultimately received checks from three of the four, which he deposited into his savings account. (Tr. 162-165, 166-168, 168). According to defendant, he mailed a package parcel post insured to Barr and would have refunded Barr's money if he could have verified non-receipt of the package. (Tr. 165). With regard to Caboose Antiques, Takach admitted that he had not yet mailed the merchandise at the time he was arrested, but claimed he then was waiting for the payment check to clear, which he was told would take three weeks. Takach contended that he was ultimately prevented from mailing the items to Caboose Antiques and White by his arrest on May 11, 1977, and subsequent incarceration for 34 days. (Tr. 169-170, 173).* Takach testified that upon

* On cross-examination, Takach acknowledged that the 34 days was in connection with serving his earlier mail fraud sentence. (Tr. 191).

release he discovered that all of his property and records had vanished from his hotel room. (Tr. 170, 173).*

ARGUMENT

The District Court Properly Admitted The Similar Act Evidence On The Question of Defendant's Intent.

Takach's sole claim on appeal is that the District Court committed reversible error in admitting evidence of defendant's prior use of the mails to defraud three other victims in circumstances remarkably parallel to those charged in the present indictment.** Although Takach concedes that his intent to defraud was directly at issue at trial and that the challenged similar act proof was relevant on this issue, he contends that the probative value of this evidence was outweighed by the "prejudicial effects" and had the "inevitable effect" of showing the defendant to be a bad man. On the record in this case, Judge Conner's decision to admit this evidence clearly was a proper exercise of the District Court's broad discretion and defendant's claim must be rejected.

At the outset of his brief, Takach recognizes, as indeed he must, that the law in this Circuit plainly permits introduction of relevant evidence relating to prior similar unlawful acts "unless offered solely to prove criminal character or disposition or the proffered evidence is of such a *highly* prejudicial nature as to *overwhelm* its probative value." *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091

* On cross-examination, Takach admitted that in 1975 he pleaded guilty to a second mail fraud scheme in which he had offered to mail U.S. silver dollars to those sending him advance payment. (Tr. 180-185).

** Takach does not challenge the District Court's ruling which admitted into evidence, on the Government's direct case, the defendant's plea of guilty to defrauding a fourth victim during 1974, and the underlying facts as set forth in that indictment.

(1977) (emphasis added). *Accord*, *United States v. Cavallaro*, 553 F.2d 300 (2d Cir. 1977); *United States v. Braunig*, 553 F.2d 777, 781 (2d Cir.), *cert. denied*, 431 U.S. 959 (1977); *United States v. Grady*, 544 F.2d 598, 604-05 (2d Cir. 1976); *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir. 1976); *United States v. Chestnut*, 533 F.2d 40, 49 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976); *United States v. Santiago*, 528 F.2d 1130 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976). Defendant, however, ignores the controlling principle that in admitting such proof the trial judge is invested with wide discretion in balancing the probative value of the evidence against the impermissible prejudicial impact, and that absent a clear abuse of discretion the District Court's rulings on such matters will not be overturned on appeal. *United States v. Braunig*, *supra*; *United States v. Albergo*, 539 F.2d 860, 863 (2d Cir. 1976), *cert. denied*, 430 U.S. 1000 (1977); *United States v. Santiago*, *supra*. See generally, *United States v. Robinson*, 560 F.2d 507, 509 (2d Cir. 1977) (*en banc*). Moreover, Takach's remarkable suggestion that the similar act law in this Circuit is too broad, disregards the fact that Fed. R. of Evid. 404(b) specifically codifies the inclusionary form of the rule admitting evidence of other crimes, in the discretion of the trial judge, if relevant, except when offered solely to prove criminal character. Any proper application of these principles at once makes apparent the lack of merit in defendant's contentions.

Rule 404(b) expressly singles out as admissible evidence of other crimes to establish "... proof of motive, opportunity, *intent*, preparation, plan, *knowledge*, identity, or absence of mistake or accident." (emphasis supplied.) Similarly, this Court consistently has approved the admission of other crimes evidence as part of the Government's direct proof in fraud cases, where, as here, knowledge and intent are routinely at issue. See *e.g.*, *United States v. Cyphers*, 556 F.2d 630 (2d Cir.), *cert.*

denied, 431 U.S. 972 (1977); *United States v. Kaufman*, 453 F.2d 306 (2d Cir. 1971); *United States v. Braverman*, 376 F.2d 249 (2d Cir.), *cert. denied*, 389 U.S. 885 (1967); *United States v. Johnson*, 382 F.2d 280 (2d Cir. 1967); *United States v. Klein*, 340 F.2d 547 (2d Cir.), *cert. denied*, 382 U.S. 850 (1965); *United States v. Robbins*, 340 F.2d 684 (2d Cir. 1965).

In this case, Judge Conner was confronted with a classic situation in which similar act evidence properly was offered and admitted. It was entirely clear from the outset—even before defendant's opening to the jury—that Takach's defense would be a denial of knowledge and criminal intent. (Tr. 7). Specifically, Takach claimed that he did not intend to defraud any of the purchasers but had been unable to make delivery because of his arrest. In the face of this defense, it was essential for the Government to show that in Takach's 1974 similar dealings through the mail he never delivered merchandise, although he received full payment from his victims and despite the absence of any obstacle on his part to completion of the transactions. Since the Government's evidence was susceptible of an interpretation that the acts alleged to have constituted the crime were innocently performed, and the crucial issues of knowledge and intent were keenly disputed, it was more than proper to admit defendant's prior similar acts. As this Court clearly has stated, where circumstances of prior misdeeds were of a strikingly similar nature to those at issue in the trial, the jury was entitled to assess “. . . the sheer improbability that a person with [defendant's] familiarity and experience with the specific criminal conduct charged . . . might have performed the acts with an innocent and lawful intent.” *United States v. Klein, supra*, 340 F.2d at 549.

With the issue thus squarely presented, the trial court demonstrated its firm grasp of the controlling principles and carefully balanced the probative value of the similar

act proof against any possible prejudicial effect. On two separate occasions before permitting introduction of this evidence Judge Conner observed the significant probative value of the highly similar proof, noted that it was the only way the Government could combat defendant's claim of a lack of intent, and ruled that this probative value was not outweighed by the danger of improper prejudicial effect, in the sense that that term is used in Rule 404(b).*

* Thus, when the question was raised prior to selection of the jury, but after full argument on the point, the District Judge observed:

"I don't think that the potential for prejudice here outweighs the probative value because that is so strong. Because of the short time that elapsed between the writing of the letters by the defendant to these four or five prospective fraud victims, and I am using the Government's allegations now as proof, and the arrest, it would be impossible [sic] for the defendant to say, 'I really intended to deliver the trains. I did not intend to defraud the people whose money I took.'

The only way the Government can combat that, since they cannot call the defendant to prove his intent, is by proof of the fact that in the Eastern District case, involving an identical type of offense, he pleaded guilty to an intent to defraud the people whose money he accepted." (Tr. 8-9).

Similarly, immediately prior to the admission of the similar act testimony, in response to counsel's inquiry, Judge Conner again addressed the issue:

"Mr. Winograd: Judge, can we get a little groundwork laid. Is your Honor allowing her to bring these people in to testify?

The Court: Yes, for the reason that you have already indicated in your opening statement and otherwise, that the defendant will contend he had no intention of defrauding the persons from whom he solicited checks or money orders.

Mr. Winograd: That's correct.

The Court: I am not aware of any other way in which the Government could prove the requisite criminal intent other than through prior similar acts. This evi-

[Footnote continued on following page]

Takach's complaint with this ruling is that he was prejudiced by the striking similarity between the proof of his 1974 fraud and the conduct charged in the indictment. Defendant's argument in this regard truly stands the similar act rule on its head, as it is the *similarity* of conduct which determines relevancy of the proof of prior bad acts. *United States v. Santiago, supra*; *United States v. Natale*, 526 F.2d 1160 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). The compelling sameness of the 1974 mail frauds and the acts charged in the indictment only served to maximize the probative value of this evidence on the issue of intent.* The "prejudice" of which Rule 404(b) speaks is not the harm caused to the defendant because the evidence is of great probative value on the issues presented by the case, but the danger that the jury will use such evidence for an *improper* purpose, such as to show criminal character, or to decide questions of fact on emotional grounds. *United States v. Robinson, supra*, 560 F.2d at 513-14.**

dence of prior similar acts is therefore necessary to the Government's case and I find that the probative value of the evidence is not outweighed by its prejudicial effect on the defendant." (Tr. 82-83).

* While similar acts need not be simultaneous with the offense charged in the indictment to be admissible, *e.g.*, *United States v. Leonard, supra*; *United States v. Klein, supra*, in this case the three-year interval between the prior bad acts and the present crimes was highly probative itself. Since the similar act victims had received the same promises and lulling letters from Takach as had the present victims, the former's failure, after three years, to have received their merchandise dispelled Takach's "but-for arrest" argument in this case.

** Judge Conner explicitly recognized this point at trial. In response to defense counsel's assertion that the evidence was too similar the trial court observed:

"The Court: All you are saying there is that the evidence is so good, so relevant, it shouldn't be admitted. You

[Footnote continued on following page]

In this case the danger of such undue prejudice was minimal, and certainly did not outweigh the probative value of the similar act proof. On two occasions—both when the evidence was received and in the charge to the jury—the trial judge carefully and completely instructed the jury at length on the limited purpose for which they could use the evidence of Takach's prior actions.* Moreover, while the similar act proof was convincingly relevant on the question of intent, it was in no way highly emotional evidence, the introduction of which could have aroused the jury's passions against defendant. See, *United States v. Robinson*, *supra*; *United States v. Leonard*, *supra*.

Nor can the evidence of Takach's prior frauds be considered prejudicial in any other sense. Contrary to defendant's sweeping reference to the Government's "parading of witnesses," it is clear that the testimony of each prior act witness was extremely brief. (Tr. 117-122, 123-128, 130-142). And, despite his vague assertions that "[t]here was no way [Takach] could have defended himself against such allegations which had never been proven in a court of law," (Br. at 20), there is no question that defendant received more than adequate notice of the similar acts the Government intended to prove.** Moreover, the Government proved the similar

wouldn't object if he were convicted of some other kind of mail fraud—at least, you wouldn't object on that ground; isn't that so?

Mr. Winograd: I wouldn't but when it is too similar" (Tr. 7-8).

* The defendant did not object to the trial judge's instructions to the jury concerning the similar act which was concededly correct. (Tr. 247-247A, 256-257).

** In the District Court defendant neither claimed surprise nor sought a continuance of the trial in order to meet the similar act proof. The Government's memorandum of law, served in advance of trial, gave specific notice of the Government's intention to prove the similar acts, and the Government supplied all pertinent documentary information on this score to Takach prior to trial.

acts in precisely the same manner as it proved the crimes charged: testimony of the victims and documentary proof, such as defendant's correspondence in his handwriting and a money order endorsed by him. Thus, when Takach now says there was no way he could have defended himself against these allegations, in essence he merely concedes that he had no defense.*

In sum, the record here makes apparent that Judge Conner's exercise of his broad discretion in admitting this proof was correct and by no stretch of imagination can be urged to have been arbitrary or irrational. *United States v. Robinson, supra*. Takach's broad-brushed attack on the introduction of the evidence of his prior mail fraud, therefore, must be rejected.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.
*United States Attorney for the
 Southern District of New York,
 Attorney for the United States
 of America.*

ROBERT J. JOSSEN,
 JANE W. PARVER,
*Assistant United States Attorneys,
 Of Counsel.*

* Defendant speculates that his counsel did not cross-examine any of the prior act witnesses "evidently" because this only would have exacerbated the prejudice. Obviously, this was a tactical decision on defense counsel's part which could have been prompted by the fact that his cross-examination of the present victims was very unproductive. Indeed, counsel even stated in summation that the victims were truthful witnesses. (Tr. 214).

